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# **Adult Children and Family Provision Claims in the Supreme Court: The Saga Concludes**

Dr Heather Conway\*

## **Introduction**

In March 2017, the Supreme Court handed down its judgment in *Ilott v The Blue Cross and Others*<sup>1</sup> following a protracted legal dispute which many practitioners (and their clients) are all too familiar with. The focus was a family provision claim: an adult daughter who had been excluded from her mother's will alleged a failure to make 'reasonable financial provision' under the Inheritance (Provision for Family and Dependants) Act 1975, despite have been both financially independent and estranged from her mother for many years.

This is the first time that a case involving the 1975 Act- the template for our own 1979 Order<sup>2</sup>- has been reached the highest appellate court in the UK. And while the final ruling in *Ilott*, as in all other family provision claims, turned on the facts of the case, the Supreme Court judgment is important for two reasons. First, in overturning the previous Court of Appeal decision, it alters the advice to be given to will-makers, prospective beneficiaries and those disinherited by a validly executed will.<sup>3</sup> Secondly, the judgment sets out general principles which will almost certainly influence future family provision claims- not just in England and Wales, but in Northern Ireland as well.

## **I. Facts and Appellate History**

The facts are well-known. Melita Jackson had been widowed in 1960, while pregnant with her only child, Heather. Aged 17, Heather left home to live with- and subsequently married- a man her mother disapproved of; this caused a major rift, and mother and daughter were never reconciled before Mrs Jackson's death in 2004. Her final will (executed in 2002) left a net estate of £486,000 to three animal charities (The Blue Cross, the RSPB and the RSPCA) that she had no lifetime connection to; Mrs Jackson made no provision for her only child who was then aged 44, had not worked since the birth of the first of her five children in 1983 and was living in a 3-bedroom property

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<sup>1</sup> [2017] UKSC 17; [2017] 2 WLR 979. The case was formerly listed as *Ilott v Mitson*.

<sup>2</sup> Inheritance (Provision for Family and Dependants) (NI) Order 1979.

<sup>3</sup> The Court of Appeal judgment (and its consequences) were discussed in H Conway, "Family Provision Claims and Adult Children: The Saga Continues..." [2015] 2 *Folio: Northern Ireland Conveyancing and Land Law Journal* 38.

rented from a Housing Association. Heather's husband worked part-time, and the family were dependent on state benefits to meet basic living expenses.

In 2007, District Judge Million ruled that the deceased had not made 'reasonable financial provision' for her daughter under the 1975 Act, and awarded Heather £50,000 from the estate. Dissatisfied with the amount, the daughter appealed; however, Eleanor King J set aside the decision on the threshold point, citing no failure to make reasonable financial provision.<sup>4</sup> The daughter then appealed to the Court in Appeal, which ruled in her favour in 2011 and remitted her appeal on quantification back to the High Court.<sup>5</sup> Parker J upheld the District Judge's ruling in March 2014.<sup>6</sup> The daughter also appealed that decision to the Court of Appeal, which raised the amount to £143,000 with an option to draw upon a further £20,000<sup>7</sup>- effectively tripling the original sum, and triggering a final appeal on quantum to the Supreme Court. In a unanimous judgment (delivered by Lord Hughes, and with a supplementary judgment from Lady Hale), the Supreme Court allowed the appeal, and restored the original award of £50,000.

## **II. Reasons for Allowing the Appeal**

The lump sum awarded by the Court of Appeal was to allow the daughter to buy the house that she and her family lived in, while the smaller amount was additional income intended to supplement her state benefits. In revisiting the District Judge's award, the Court of Appeal claimed that he had committed two fundamental errors of principle. The first was in limiting his award to take account of the lengthy estrangement between the parties; the second was reaching a figure of £50,000 without considering the impact on the daughter's benefits (the Court of Appeal had structured the smaller payment in a way which would not push the daughter's savings above the £16,000 eligibility threshold for Housing Benefit and Council Tax Benefit which were a key part of the family's net annual income).

Delivering its judgment, the Supreme Court ruled that the District Judge had not erred on either point. Having analysed all of the factors listed in s 3 of the 1975 Act,<sup>8</sup> the District Judge was entitled to view the relationship between mother and daughter and their lengthy estrangement as "one of the two dominant factors in this case"<sup>9</sup> (the other being the daughter's straitened financial position). The mother's will had failed to make reasonable financial for her daughter, and the District Judge was "perfectly entitled" to

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<sup>4</sup> [2009] EWHC 3114 (Fam); [2010] 1 FLR 1613.

<sup>5</sup> [2011] EWCA Civ 346; [2012] 2 FLR 170.

<sup>6</sup> [2014] EWHC 542 (Fam); [2015] 1 FLR 291.

<sup>7</sup> [2015] EWCA 797; [2016] 1 All ER 932.

<sup>8</sup> In NI, art 5 of the 1979 Order.

<sup>9</sup> [2017] UKSC 17 at [35].

conclude that any award “was coloured by the nature of the [parties’] relationship”.<sup>10</sup> Turning to the second suggested error, the District Judge had specifically addressed the impact on benefits twice in his judgment, and settled on a figure of £50,000.<sup>11</sup> Receipt of benefits was a factor for courts to consider;<sup>12</sup> having done so, the District Judge was entitled to reach a less generous outcome than the Court of Appeal, and had not erred in principle.

### **III. The Supreme Court Judgment: Key Points**

It is hard to disagree with the Supreme Court’s assessment of the judgment below and the reasons for overturning it. However, in reaching this conclusion and looking at the operation of the 1975 Act more generally, the Supreme Court judgment makes a number of important points which extend beyond the unique factual matrix of this particular case, and will almost certainly impact on the equivalent Northern Ireland jurisdiction.

#### **1. Testamentary Freedom**

Melita Jackson had made her reasons for excluding her daughter perfectly clear, prompting suggestions that the various rulings- and the second Court of Appeal ruling in particular- were ignoring this fact. However, the Supreme Court has now reasserted the importance of testamentary freedom in family provision cases involving contested wills. This was clear from the opening line of Lord Hughes’ judgment: “English law recognises the freedom of individuals to dispose of their assets by will...in whatever manner they wish”.<sup>13</sup> Later, he criticised the Court of Appeal’s award as giving “little if any weight to the quarter century of estrangement or to the testator’s very clear wishes”.<sup>14</sup>

The fact that greater weight should be given to the deceased’s wishes will be welcomed by many. Of course, testamentary freedom is not absolute because it is qualified by the 1975 Act and the 1979 Order; however, will-makers (and those advising them) should be more confident that personal choices will be respected.

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<sup>10</sup> [2017] UKSC 17 at [35].

<sup>11</sup> This sum would allow the daughter to purchase essential household items (she had listed various things that she needed to replace), and the money spent on these would minimise the impact on means-tested benefits since a large amount of the £50,000 would be spent (leaving savings of less than, or close to, the £16,000 limit).

<sup>12</sup> The legislation instructs judges to look at an applicant’s “financial resources and financial needs”- 1975 Act, s 3(1)(a) and 1979 Order, art 5(1)(a).

<sup>13</sup> [2017] UKSC 17 at [1]. In her supplementary judgment, Lady Hale described testamentary freedom as “the default position in the law of England and Wales, subject to the courts’ limited discretionary powers”- [2017] UKSC 17 at [52].

<sup>14</sup> [2017] UKSC 17 at [46].

## 2. Conduct and Family Relationships

Conduct has always been a relevant factor in family provision cases,<sup>15</sup> even if there are relatively few cases in which it has swayed the final outcome. The Supreme Court ruling does not alter this: conduct is an important, but not a decisive, factor. And while family provision claims should focus on whether or not reasonable financial provision has been made for a particular claimant, the reasonableness or otherwise of the testator's actions in excluding a particular individual can be taken into account.<sup>16</sup> However, this was not to say that a family provision claim should succeed just because the deceased was deemed to have acted unreasonably. As Lord Hughes stressed:

[T]he deceased may have acted unreasonably, indeed spitefully, towards a claimant, but it may not follow that his [or her] dispositions failed to make reasonable financial provision for that claimant...<sup>17</sup>

What is notable here is that family rifts are relevant, and can result in a particular claim being rejected, or in a reduced award (if there has been a failure to make reasonable financial provision). This seems instinctively correct: where it exists, estrangement is part of the factual matrix and something that courts should take into account; the District Judge was entitled to do so in the present case, where the rift was so longstanding, and the Court of Appeal did not give this factor sufficient weight.

Again, it is hard to disagree with this approach. However, the Supreme Court did sound a note of caution, stressing that awards should not become "rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased".<sup>18</sup>

## 3. Maintenance Means Just That

Surviving spouses and civil partners aside, claims are restricted to 'maintenance' though the term itself is not defined in the legislation. Previous case law suggests a restrictive interpretation,<sup>19</sup> something that Lord Hughes affirmed in *Ilott* (maintenance "cannot

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<sup>15</sup> Courts are required to look at the "conduct of the applicant or any other person" under s 3(1)(g) of the 1975 Act and art 5(1)(g) of the 1979 Order.

<sup>16</sup> According to the Supreme Court, this could be factored into conduct under s 3(1)(g) of the 1975 Act (art 5(1)(g) of the 1979 Order), or perhaps the deceased's obligations and responsibilities towards the applicant under s 3(1)(d) (our art 5(1)(d)). It is more difficult to see how this fits into the latter category.

<sup>17</sup> [2017] UKSC 17 at [17].

<sup>18</sup> [2017] UKSC 17 at [17].

<sup>19</sup> See for example, the comments of Browne-Wilkinson J (as he then was) in *In Re Dennis (Deceased)* [1981] 2 All ER 140, 146 describing it as "payments which...enable the applicant...to discharge the cost of his daily living at whatever standing of living is appropriate to him".

extend to any or every thing which it would be desirable for the claimant to have” and must “import provision to meet the everyday expenses of living”).<sup>20</sup>

Of course, the issue here was whether a lump sum of £143,000 to purchase a house could be properly described as maintenance, and the clear inference from the Supreme Court judgment is that the Court of Appeal had erred in that respect. The statutory power was “to provide for maintenance, not to confer capital on the claimant”;<sup>21</sup> and while provision of housing can constitute maintenance in some cases, their Lordships suggested that a life interest would be more appropriate than a capital sum.

So, successful family provisions claims will probably result in much smaller awards than those being touted after the Court of Appeal decision in *Iloft*. The maintenance threshold should act as a natural check on any judicial temptation to make an overly generous award, and significant legacies or life-changing sums should not be expected.

#### **4. Bad News for Adult Children**

Family provision claims by adult children have always been notoriously difficult. The Court of Appeal ruling was seen as a game changer, given the significant financial award to a daughter who had been living independently from, and who had long since ceased to have any financial (or emotional tie) to her mother. Expectations now need to be tempered: parents are free to disinherit their adult children (though will probably still need to set out their reasons for doing so, in the event that a will is challenged).

The Supreme Court judgment does not suggest that independent adult children will *never* succeed; however, the clear inference is that claims by adult children who are financially independent from their parents (or, at least, capable of earning their own living) will be treated cautiously by courts and can (if successful) expect much less generous awards than the one made by the Court of Appeal. In this sense, the Supreme Court decision probably returns the law to its pre-*Iloft* position in England and Wales.

It will be interesting to see how this plays out in Northern Ireland, given that courts here have tended to be more generous towards adult children.<sup>22</sup> A more restrained approach is certainly possible, and future claims might be discouraged- especially where an adult son or daughter is ‘comfortably off’ or supporting themselves financially. Being in financial need does not guarantee that an award will be made, and the fact that the

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<sup>20</sup> [2017] UKSC 17 at [14].

<sup>21</sup> [2017] UKSC 17 at [15].

<sup>22</sup> See for example, *Re Creeny* [1984] NI 397 and *McKernan v McKernan* [2007] NICH 6, as well as the comments of Horner J in *Moffatt v Moffatt* [2016] NICH 17 at [19].

daughter in *Ilott* depended on means-tested benefits to meet basic living expenses did not significantly strengthen her case.

## **5. Good News for Charities and for Beneficiaries in General**

Although the charities were only mentioned briefly in the Supreme Court judgment, what was said was important- and changes the advice that might have been given to these organisations, and to testators contemplating charitable bequests, in the wake of the Court of Appeal ruling.

The Supreme Court rejected the Court of Appeal's claim that the charities did not have a competing need. While their claim was "not on a par" with that of Heather Ilott, charities "depend heavily on testamentary bequests for their work... More fundamentally, these charities were the chosen beneficiaries of the deceased".<sup>23</sup> The reality, as Lord Hughes pointed out, was that an award of £163,000 to Heather Ilott (or any successful litigant) "was at the expense of those whom the testator intended to benefit".<sup>24</sup>

Charities will welcome the Supreme Court ruling, for obvious reasons. Though heavily reliant on public funding in order to survive, in the wake of the Court of Appeal ruling, charities were probably less inclined to defend family provision claims where bequests to them were subsequently challenged. That is likely to change now, with charities more confident of a positive outcome. Testators should probably still list their reasons for benefitting a particular charity (especially where the gift is a sizeable one), and a record kept in the client's file notes. And while the absence of a lifetime connection to a chosen charity may raise eyebrows, it will not strengthen the claimant's hand in a family provision claim.<sup>25</sup>

More generally, when wills are contested under the 1975 Act, nominated beneficiaries do not have to justify their selection nor do they have to demonstrate some sort of financial need (though, it goes without saying that their needs will be highly relevant in practice); the simple fact is that they were chosen by the deceased, in a clear expression of testamentary intent. The onus is very much on those making a family provision claim to meet the statutory criteria.

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<sup>23</sup> [2017] UKSC 17 at [46].

<sup>24</sup> [2017] UKSC 17 at [46].

<sup>25</sup> Other practical matters to be addressed when dealing with charitable bequests are set out in S Grattan, "Charities as Beneficiaries and Elementary Duties" [2017] 1 *Folio: Northern Ireland Conveyancing and Land Law Journal* 19.

#### **IV. Family Provision Claims: Still Unpredictable, But Slightly Less So?**

After almost a decade of litigation and six different judgments, the Supreme Court ruling in *Iltis* takes us full circle in upholding the decision of the District Judge. This in itself should act as a warning: appeals will only succeed in very limited circumstances. As Lord Hughes pointed out, an appellate court “should never [interfere]...simply on the grounds that its judge(s) would have been inclined, if sitting at first instance, to have reached a different conclusion”.<sup>26</sup> The numerous twists and turns in this lengthy appellate saga also show that different courts can reach fundamentally different conclusions<sup>27</sup> on the same set of facts.<sup>28</sup>

The Supreme Court ruling does not change the law, but it does set out some key points of principle which will impact on the advice given to testators, prospective beneficiaries and those contemplating family provision claims. Testamentary freedom is not an absolute right, but will be given greater weight; maintenance is, by definition, just that; chosen beneficiaries do not need to justify their inclusion or establish some sort of competing need; and disinherited adult children may find it difficult to succeed, and should probably expect more modest awards if they do. Individual outcomes will still be difficult to predict in family provision cases- hardly surprising when courts are being asked to make value judgments based on “very variable personal and family circumstances”.<sup>29</sup> However, the judgment does seem to tip the balance in favour of those defending the deceased’s will.

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<sup>26</sup> [2017] UKSC 17 at [24].

<sup>27</sup> Both on the threshold test (failure to make reasonable financial provision), and the issue of quantum.

<sup>28</sup> In her supplementary judgment, Lady Hale set out three contrasting decisions that the District Judge would have been perfectly entitled to make in the present case, namely (i) making no order at all (what Eleanor King J decided); (ii) doing what the Court of Appeal effectively did in 2015; or (iii) reaching the decision that he reached back in 2007- [2017] UKSC 17 at [65].

<sup>29</sup> [2017] UKSC 17 at [24].